

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1242

To be argued by
JONATHAN J. SILBERMANN

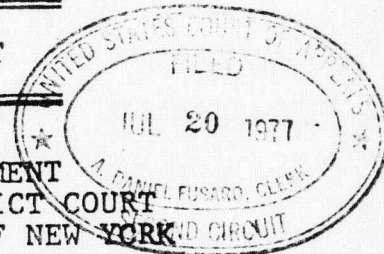
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
LORRAINE V. GLOVER,
Defendant-Appellant.

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Docket No. 77-1242

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the improper remarks of the Assistant United States Attorney in his rebuttal summation and the erroneous admission of collateral evidence require reversal of the judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal) rendered on May 4, 1977, after a jury trial, convicting appellant Lorraine V. Glover of unlawfully converting to her own use approximately \$1,000 which she had received in the course of her employment with the Postal Service, in violation of 18 U.S.C. §1711.

Appellant was sentenced to two years' imprisonment. Execution of sentence was suspended, and appellant was placed on probation for that period.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On January 24, 1977, an indictment was filed charging appellant with embezzling approximately \$1,000 which she had obtained during her employment as a window clerk at the College Station Post Office.*

*The indictment is B to the separate appendix to appellant's brief.

At trial, Barbara L. Bolling, appellant's supervisor at the Post office (20*), testified that from May 1, 1976, through August 16, 1976, appellant was a window clerk at the College Station Post Office (34) and that on August 16, 1976, appellant's fixed credit** at the post office was audited (39-40, 78). Bolling stated that appellant's account did not balance, indicating a shortage of approximately \$973 (39, 48, 91).*** As a result, Bolling communicated with the postal examiners (49).****

Later that day, two postal inspectors arrived at the post office to investigate the shortage and interrogate appellant (49). One of these persons, Inspector Stephen Panzera, testified that on August 16, 1976, he, Inspector Marshall, and two postal examiners audited appellant's fixed account (94). They found a shortage of \$1,007.55 (99, 124, 183). After the audit, Inspector Panzera questioned appellant about the missing funds.

*Numerals in parentheses refer to pages of the trial transcript.

**"Fixed credit" was defined as an account assigned to a postal employee, used by the employee to sell stamps and make change (22). The account includes stamp stock -- stamps, envelopes, and postal cards -- as well as cash (21-22, 30, 75).

***Bolling testified that appellant said that she could account for a portion of the missing credit; that someone had purchased stamps with a check for \$560; and that the check had been misplaced (42-43).

****Further, Bolling testified that after the interrogation by the postal inspectors, appellant denied taking the money (55-56).

The inspector testified that although appellant initially denied having taken the money (105, 127, 189), as a result of the interrogation, appellant signed a written statement which, in pertinent part, reads:

I have two children that I take care of. I could not afford another child so I paid for an abortion. I took small sums of money at a time and it just all added up.... I paid a down payment of \$750.00 for the abortion and monthly payments of fifty dollars per month. The total cost was \$1,750.00. I used the money taken from my credit to pay off the doctors. After I gave him 750 down payment I made arrangements to pay him a set amount of money from my pay every two weeks. But it seem he had to leave town and wanted the money all at once so I paid him in a period of four pay checks to pay him and then I took a small amount of money from my cash drawer to help me maintain my house hold.... He threatened to tell my family and friends if I did not finished paying him off at once so I had no other choice. I have never did anything like this before.... I did not intended to use the money from my draw but after what the doctor said I had no other choice at the time.

(GX-9*).

This statement was admitted in evidence** (116, 166).

*Numerals in parentheses preceded by "GX" refer to numbers of the Government Exhibits in evidence. Panzera testified that, prior to signing the written statement, appellant told the inspector that the shortage was due to the loss of a check used to pay for postage (104). After further questioning, appellant stated that she took the money to pay her father's medical expenses (107, 127-128, 165).

**The following day, August 17, 1976, appellant was interviewed by Assistant U.S. Attorney Robert Mazur (172). At that time appellant was asked if she desired to change her written

Appellant testified in her own behalf. She stated that on August 16, 1976, she initially told Inspector Panzera that she had not taken the money from her fixed account (205). After the inspector indicated that if appellant had in fact used the money for a family emergency, "the postmaster would understand" (205), appellant told the inspector that the money was needed for medical expenses for her father (206). However, appellant then indicated to the inspector that this statement was false (207), explaining that the money was used to pay for an abortion (207). This explanation was the basis for appellant's written statement which had already been admitted in evidence. Appellant testified that the written statement was not true and that she had signed it only because she was tired of the interrogation and believed the inspector's statement that the postmaster would understand a hardship case (208-209).^{*} Further, appellant denied taking any money from her fixed credit, and stated that she did not know who was responsible for the theft (208, 212), indicating that other persons in the post office had access to the money (209-210).

(Footnote continued from the preceding page)

statement. According to Postal Inspector Eddie Marshall, appellant confirmed the prior statement, and a written statement to that effect, signed by appellant, was admitted in evidence (175-176, 178-179) (GX-10).

^{*}Appellant explained that the following day in the Assistant U.S. Attorney's office she did not correct her statement because she "hadn't the vaguest idea of what was really going on" (212).

On cross-examination, the Assistant U.S. Attorney elicited, over defense counsel's objection, that appellant had undergone an abortion and that the hospital fee for it was \$250 (217-218). The Assistant U.S. Attorney then asked if appellant had had an abortion in 1976. Appellant denied having an abortion at that time, but stated that she had been in the hospital for one day during March 1976 (218-219, 222). Over defense counsel's objection that appellant's hospital authorization for an "induced abortion" dated March 24, 1976, and the question of whether appellant had undergone such an operation was "completely collateral" (221), the authorization was admitted in evidence (222) (GX-14A). Appellant further explained to the jurors that she had authorized her doctor to perform an abortion but that the doctors at the hospital discovered that her gynecologist had incorrectly diagnosed her condition (223).

As a result of further cross-examination, appellant stated that in July and August 1976 she had applied for a \$1,000 loan from the Federal Credit Union (226-229). Appellant denied requesting \$2,000, explaining that at that time she owed a total of \$2,500 to the Credit Union. The Assistant U.S. Attorney then offered in evidence a Federal Credit Union "Line of Credit Request Voucher" and a \$1,000 check, each dated July 26, 1976, and a separate Federal Credit Union loan application dated August 6, 1976. Over defense counsel's objection that this proof was collateral (229-230), the documents and check were admitted in evidence "on the issue of credibility" (GX-15, 16; 230-231).

In concluding his rebuttal summation,* the Assistant U.S. Attorney stated:

Now, the Government doesn't pretend to know what Lorraine Glover did with the money. All we know is that she took it.

(266).

Shortly thereafter, the Assistant U.S. Attorney told the jury:

Ladies and gentlemen, you may live a hundred years, and you may be on a hundred juries, but you will never see a case where the proof of guilt is stronger than in this case.

(266-267).

Defense counsel objected to this statement, whereupon the district judge stated:

It's up to the jury.

(267).

After receiving the Government's exhibits, hearing the re-reading of trial testimony (288), and deliberating further, the jury found appellant guilty as charged.

*The rebuttal summation is included as D to the separate appendix to appellant's brief.

ARGUMENT

THE IMPROPER REMARKS OF THE ASSISTANT UNITED STATES ATTORNEY IN HIS REBUTTAL SUMMATION AND THE ERRONEOUS ADMISSION OF COLLATERAL EVIDENCE REQUIRE REVERSAL OF THE JUDGMENT.

A. The Assistant U.S. Attorney's rebuttal summation was improper.

In the course of his argument to the jurors, the Assistant U.S. Attorney told them:

[Y]ou may live a hundred years, and you may be on a hundred juries, but you will never see a case where the proof of guilt is stronger than in this case.

(266-267).

This statement, virtually identical to that condemned in United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970), was clearly improper.* As this Court explained in Grunberger:

If the jury believed that the prosecutor was an experienced one and knew about a lot of cases, they were left with no alternative but to believe the Government's witness.... The remark was not merely an averment of a personal belief in [the defendant's] guilt based on the evidence adduced at ... trial; it was a statement of belief that the jury was expected to

*In Grunberger, supra, 431 F.2d at 1068, the Assistant U.S. Attorney stated:

I don't know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant.

understand came from the prosecutor's personal knowledge of, and from the prosecutor's prior experience with, other defendants, and as such he was speaking as an expert based upon matter outside the record.

Id., 431 F.2d at 1068.

Moreover, the improper effect was further cemented by the prosecutor's prior remark that

[t]he Government doesn't pretend to know what Lorraine Glover did with the money. All we know is that she took it.

(266).

Thus, the Assistant U.S. Attorney's statements impermissably conveyed to the jurors the impression that the prosecutor had personal knowledge of other incriminating evidence outside the record (United States v. Grunberger, supra, 431 F.2d at 1068; Lawn v. United States, 355 U.S. 339, 359 n.15 (1958); Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967)), and improperly communicated the Assistant U.S. Attorney's personal belief in appellant's guilt. United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973); United States v. Grunberger, supra, 431 F.2d at 1068; Hall v. United States, 419 F.2d 582, 586 (5th Cir. 1968); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960); ABA Standards, The Prosecution Function and the Defense Function, Standard 5.8 (1971).

Not only were the prosecutor's remarks improper, but the district court's response to counsel's objection ("It's up to the jury" (267))* only compounded the error. This is so since

*The court's instruction was simply a non sequitur.

it left the jurors free to consider the prosecutor's statements while failing to correct the erroneous impression created by them.

B. The admission into evidence of the hospital authorization, loan application, and check for \$1,000 was error.

During cross-examination, the prosecutor questioned appellant as to whether she had undergone an abortion in March 1976. As a result of this cross-examination, appellant testified that she did not have that operation at that time. Over defense counsel's objection that the issue of appellant's abortion was collateral and that extrinsic evidence should therefore not be permitted to contradict appellant's answers (220-222), an authorization for an abortion dated March 24, 1976, and signed by appellant, was admitted in evidence.

Similarly, appellant was asked about her dealings with the Federal Credit Union on July 26 and August 6, 1976. Thus, appellant testified that she had requested one check for \$1,000 during that period, and not \$2,000; that she also requested an additional \$200; and that she had incurred a total indebtedness to the Union of \$2,500 (229). Despite defense counsel's objections that various documents relating to this question were collateral and should be excluded (229-230), two documents -- a check and a voucher dated July 26, 1976 (GX-16) -- and an application for a loan dated August 6, 1976 (GX-15) were admitted in evidence "on the issue of credibility," presumably to con-

tradict appellant's initial testimony that she had received only one check for \$1,000 during that time. The admission of the evidence relating to appellant's abortion and her dealings with the Federal Credit Union was improper.

The question of whether appellant had an abortion was irrelevant to any substantive issue in the case. Indeed, the hospital authorization itself was not even probative of the Government's position that appellant had an abortion during March 1976, since the document shows only an authorization for, not the performance of, such an operation. Not only was the issue of appellant's abortion irrelevant but, given the sensitive nature of the question and its potentially inflammatory impact on the jurors, extrinsic evidence about it should have been excluded in the trial judge's discretion. See Federal Rules of Evidence, Rule 403.

Similarly, the evidence relating to appellant's indebtedness to the Federal Credit Union was also irrelevant. Appellant had admitted incurring loans from the Union of up to \$2,500. Thus, documents relating to these transactions could have been offered only for the precise purpose of contradicting appellant's specific memory of these immaterial events.

This method of proceeding was improper. While the district court does have discretion to control the extent of cross-examination (Federal Rules of Evidence, Rule 611),

[n]othing is better settled than that a witness, whether a party or not, may not be asked questions as to irrelevant matters

on cross-examination for the purpose of contradicting his answers and thus discrediting [them].

United States v. Lawinski,
195 F.2d 1, 7 (7th Cir. 1952);

United States v. Lambert, 463 F.2d 553, 557 (7th Cir. 1972);

United States v. Williamson, 424 F.2d 353, 356 (5th Cir. 1970);

Head v. Halliburton Oilwell Connecting Co., 370 F.2d 545, 546

(5th Cir. 1967); United States v. Masimo, 275 F.2d 129, 133

(2d Cir. 1960); Arpan v. United States, 260 F.2d 649, 658 (8th

Cir. 1958); United States v. D'Ercole, 225 F.2d 611, 614 (2d

Cir. 1955); Cohen v. United States, 56 F.2d 28, 30 (1st Cir.

1932); 3A Wigmore, EVIDENCE §1000 et seq. (Chadbourn rev. 1970);

Thus, the district court's determination that the evidence was admissible on the question of credibility was incorrect.

If testimony in relation to an immaterial matter is elicited upon cross-examination, it is not open to contradiction for the purpose of disparaging the credibility of the witness.

Cohen v. United States, supra,
56 F.2d at 30.

* * * * *

The prosecutor's objectionable remarks during his rebuttal summation and the admission in evidence of collateral proof were highly prejudicial. Not only did each error improperly discredit appellant's credibility, but the prosecutor's rebuttal summation compounded the error by injecting into the case his personal opinion about the credibility of the Government's witnesses and the relative strength of its

case. Thus, because the errors were prejudicial, reversal of the judgment is required.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and a new trial granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

July 20, 1970

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan Silverman